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No. 95-1698

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

STRATTON GEORGOULIS,

Petitioner,

v.

UNITED STATES OF AMERICA AND
ALLIED PRODUCTS CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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I. INTRODUCTION

The Eighth Circuit held in this case that *indirect* control over the arrangement for disposal of hazardous substances results in arranger liability. Respondents, not surprisingly, echo support for this holding. An overwhelming number of courts that have addressed the issue, however, have limited arranger liability to direct and deliberate participation in the disposal decision. To resolve this conflict between the circuits, the Court need answer only a single question: Does section 107(a)(3) of CERCLA impose arranger liability on a person who does not directly participate in the decision to dispose of hazardous waste? Petitioners urge the Court to grant the petition for certiorari to answer this question and resolve the conflict among the circuits.

II. ARRANGER LIABILITY UNDER CERCLA

A. CERCLA Section 107(a)(3).

Arranger liability under section 107(a)(3) may be imposed only on a person who:

1) by contract, agreement or otherwise,
2) arranged for
3) disposal or treatment
4) of hazardous substances
5) owned or possessed by such person.

42 U.S.C. § 9607(a)(3).

B. The Eighth Circuit's opinion.

The Eighth Circuit held that the "arranged for" element of section 107(a)(3) is satisfied when a person exercises "actual or substantial control, directly or *indirectly*, over the arrangement for disposal, or the off-site disposal, of hazardous waste." *United States v. TIC Inv. Corp.*, 68 F.3d 1085, 1089 (8th Cir. 1995) (emphasis added). The court found Georgoulis liable as an arranger because he "arranged for" disposal by exercising indirect control over the disposal decision. *Id.* at 1090. The court attributed "indirect" control to Georgoulis because he, like all corporate executives, had ultimate control of the corporation and did control certain aspects of WFE's operations. The facts demonstrate, however, that Georgoulis did *not* participate in or make any decisions relating to waste disposal, nor did he have any knowledge of any waste disposal decisions made by anyone else in the corporation. The Eighth Circuit's conclusion that Georgoulis's conduct demonstrates that he "arranged for" disposal conflicts with other circuits, which have limited arranger liability to those who actively participate in the disposal decision. In fact, the Eighth Circuit stands alone.

"Arranged for" is not defined by CERCLA and, under rules of statutory construction, the Eighth Circuit was required to give the term its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, ___ U.S. ___, 115 S. Ct. 788, 793 (1995). In determining the ordinary meaning of "arranged for," the Eighth Circuit should have given effect to every word in the statute so that no words are rendered redundant. *Gustafson v. Alloyd Co., Inc.*, ___ U.S. ___, 115 S. Ct. 1061, 1063 (1995); *Department of Treasury v.*

Fabe, 508 U.S. 491, 504 n.6, 113 S. Ct. 2202, 2210 n.6 (1993). The Eighth Circuit did not. Instead of giving the term its ordinary meaning and a meaning separate from other elements of the statute, the court incorrectly construed the "arranged for" element of section 107(a)(3) under the analyses used to determine "owned or possessed" under section 107(a)(3) and "operator" liability under section 107(a)(2). In short, the Eighth Circuit effectively eliminated the "arranged for" element of arranger liability.

1. The Eighth Circuit incorrectly analyzed section 107(a)(3) and applied an "owned or possessed" analysis to determine the "arranged for" element of the statute.

While section 107(a)(3) requires proof of the other elements identified above, those other elements are not at issue here. The issue in this case relates solely to the "arranged for" element of arranger liability. The Eighth Circuit expressly recognized this. The court stated: "[T]here is no dispute that the hazardous substances disposed of at the dumpsite were owned by defendants. We need only decide whether or not defendants 'arranged for' disposal of hazardous substances at the dumpsite . . . " *United States v. TIC Inv. Corp.*, 68 F.3d 1085, 1086 (8th Cir. 1995); App. at 8. Nevertheless, the Eighth Circuit went on to apply the "owned or possessed" analysis of section 107(a)(3) in making its "arranged for" determination.[1]

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[1] In its Brief in Opposition, Respondent Allied highlights this difference by distinguishing *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995) from the instant case on the basis that the *Vertac* court was

The circuit courts have consistently interpreted the "owned or possessed" element of section 107(a)(3) to include liability for parties who have "authority to control" the disposal process. This was the issue addressed in *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995) and its progeny. *See generally, United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 406-07 (N.D. Tex. 1995), *aff'd*, ___ F.3d ___ (5th Cir. Aug. 8, 1996). Specifically, the Eighth Circuit found Georgoulis's authority to control WFE's operations and his actual control of certain aspects of WFE's operations significant to the "arranged for" analysis. As explained below, however, Georgoulis's "authority to control" and actual control of WFE, if any, is not relevant to the "arranged for" analysis; it does not show that he "arranged for" the disposal. Regardless of Georgoulis's ownership or possession of the waste or "authority to control" the disposal, Georgoulis can *only* be held liable as an arranger if he *also* "arranged for" the disposal by actually participating in the decision to dispose. See infra § II.C.2.

The Eighth Circuit, therefore, incorrectly combined the "owned or possessed" element of arranger liability with the "arranged for" element, creating a conflict among the circuits on this issue and expanding CERCLA liability beyond that intended by Congress.

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analyzing the "owned or possessed" element and not the "arranged for" element of arranger liability.

2. The Eighth Circuit incorrectly analyzed section 107(a)(3) and applied an "owner/operator" analysis of section 107(a)(2) to determine the "arranged for" element of section 107(a)(3).

In imposing arranger liability on Georgoulis under section 107(a)(3), the court also relied upon cases like *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994), which analyzed *operator* liability under section 107(a)(2). Yet, the Second Circuit made clear in *General Electric Co. v. AAMCO Transmissions, Inc.* that liability as an arranger under section 107(a)(3) has distinct characteristics from liability as an owner or operator under section 107(a)(2). 962 F.2d 281, 287 (2d Cir. 1992). For example, while the exercise of management authority is a factor in determining direct liability as an owner/operator under section 107(a)(2), this factor is not relevant to the arranger liability analysis under section 107(a)(3). *See General Electric*, 962 F.2d at 287 n.4.[2]

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[2] Contrary to Respondent's assertions, the court in *General Electric* did not suggest that the actual exercise of management authority is relevant to arranger liability. On the contrary, the Second Circuit quoted *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991), which is a case involving a person's liability as an *owner/operator* under section 107(a)(2), to show that the exercise of management authority is an element in determining *owner/operator* liability under that section. The *General Electric* court did *not* apply the "management authority" test to determine arranger liability under section 107(a)(3). *General Electric*, 962 F.2d at 287 & n.4.

C. In all other circuits, Georgoulis would not be liable.

1. Georgoulis did not directly participate in the decision to dispose of waste.

There is no dispute in this case that Georgoulis had absolutely no knowledge of the existence or substance of the agreement between WFE and HEC for the disposal of waste. *TIC*, 68 F.3d at 1084. As a result, Georgoulis did not even know about, much less make or directly participate in, the waste disposal decision. Thus, all parties agree that any impact Georgoulis had on the disposal decision was, at most, *indirect*. The Eighth Circuit held such indirect impact sufficient for arranger liability under section 107(a)(3). All other circuits that have addressed the issue disagree.

2. All other circuits addressing the issue limit arranger liability to those who directly and actively participate in the decision to dispose of waste.

Prior to the Eighth Circuit's decision in this case, the circuit courts of appeals addressing the issue have refused to impose arranger liability unless (1) the party personally participated in the decision to dispose of waste *or* (2) had an obligation to arrange for the disposal of waste.[3] *See South Florida Water Mgmt. District v. Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996); *General Electric*, 962

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[3] The obligation to arrange for disposal arises in circumstances where a party assumes a duty to arrange for the disposal of hazardous waste. This would occur, for example, when a person enters into a contract under which he agrees to

F.2d at 286-87. In *Montalvo*, the Eleventh Circuit refused to impose arranger liability on landowners who had contracted with a pesticide company to spray their property because the landowners did not take any affirmative act to dispose of the waste. *See Montalvo*, 84 F.3d at 407-08. Consistent with these cases, the Ninth Circuit imposed arranger liability on a corporation that actively participated in the decision to arrange for waste disposal by entering into a contract for such arrangement. *See Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992). Ironically, in both *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) and *United States v. Aceto Agr. Chem. Corp.*, 699 F. Supp. 1384 (S.D. Iowa 1988), *aff'd in part, rev'd in part on other grounds*, 872 F.2d 1373 (8th Cir. 1989), the court of appeals in this case – the Eighth Circuit – also expressly limited arranger liability to those who actually participated in the decision to dispose of waste.

Respondents argue that the Eighth Circuit's decision in this case is consistent with that of the Second Circuit in *General Electric* because *General Electric* applied a "nexus" requirement. The nexus requirement established in *General Electric*, however, differs substantially from that created by the Eighth Circuit in this case. Under *General Electric*, a party "arranged for" the disposal of hazardous

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accept the obligation of waste disposal. *See, e.g., General Electric*, 962 F.2d at 287. Such an obligation is not present in the instant case and Respondents have not urged the existence of such an obligation. Moreover, the Eighth Circuit did not find Georgoulis liable as an arranger based on any obligation to arrange.

waste *only* if that party (1) actively participates in the decision to dispose of hazardous waste *or* (2) has the obligation to exercise control over hazardous waste disposal. 962 F.2d at 286-87.

While the Eighth Circuit in this case stated that it was applying the nexus test of *General Electric* in its analysis, it did not. The court neither based its decision on any obligation of Georgoulis to exercise control over the hazardous substances nor held that Georgoulis actively participated in the decision to dispose of hazardous waste. On the contrary, the Eighth Circuit imposed liability on Georgoulis for conduct which it said *indirectly* impacted the disposal process after expressly finding that he did not actively participate in the disposal decision. The Eighth Circuit thus created a new test for arranger liability that expands liability beyond the Second Circuit's nexus requirement in *General Electric*.

Additionally, district courts have consistently limited arranger liability to those who actively participate in the decision to arrange for disposal of waste. *See State ex rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 742 n.2 & 743, *clarification denied*, 889 F. Supp. 849 (E.D.N.C. 1995) (finding arranger liability for corporate officer who personally made the business decision and directed individuals to dispose of waste, and finding no arranger liability for president of company who did not directly participate in the decision to dispose of waste); *United States v. Shell Oil Co.*, 1995 U.S. Dist. LEXIS 19778, *23 (C.D. Cal. 1995) (finding arranger liability where Government actually "undertook the rental of storage tank for disposal of acid wastes"); *State of New York v. SCA Servs., Inc.*, 844 F. Supp. 926, 928 (S.D.N.Y. 1994) (finding arranger liability for

corporation that transported hazardous waste where corporation actually contacted disposal company to arrange for disposal of waste despite corporation's lack of awareness regarding ultimate disposal site of waste); *United States v. Ward*, 618 F. Supp. 884, 894-95 (D.C.N.C. 1985) (finding corporate officer liable as arranger because he was "personally involved in the decision" to dispose of hazardous waste). As a result, the Eighth Circuit stands alone in imposing arranger liability on one who does not directly and personally participate in the decision to dispose of hazardous waste.

3. The "intentional conduct" requirement of the "arranged for" element means active participation in the decision to dispose.

As explained by Petitioner in his principal brief, "arranged for" implies intentional conduct. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994). A party must intend to arrange for disposal before it can be liable under section 107(a)(3) of CERCLA. *Id.* The use of the "intent" terminology apparently led to some confusion on the part of Respondents and the Eighth Circuit. Petitioners agree with Respondents and the Eighth Circuit that there is no "intent to *dispose*" requirement for arranger liability. However, as described above, there is an "intent to *arrange*" requirement, i.e. a requirement of actual, direct participation in the decision to dispose. Because the Eighth Circuit's opinion in the instant case imposes liability based on indirect rather than direct and

deliberate participation in the disposal decision, it conflicts with cases imposing an intent "to arrange" requirement.

III. CONCLUSION AND PRAYER

The Eighth Circuit's new test for arranger liability effectively eviscerates the "arranged for" element of section 107(a)(3). This result conflicts with both the plain meaning of section 107(a)(3) of CERCLA and the decisions of other circuit courts that have addressed the issue. Thus, contrary to the Respondents' assertions, this is precisely the circumstance that requires the exercise of the Court's jurisdiction. Petitioner respectfully urges the Court to grant the petition for certiorari.

Respectfully submitted,

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